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Supreme Court of the United States

OCTOBER TERM, 1959

No. 657

J. A. FOLGER & COMPANY,
Petitioner

versus

UNITED FRUIT COMPANY,
Respondent

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Eberhard P. Deutsch,
Hibernia Bank Building
New Orleans 12, Louisiana
Attorney for Petitioner

Deutsch, Kerrigan & Stiles,
René H. Himel, Jr.,
Of Counsel

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Petitioner seeks certiorari to review a judgment of the Court of Appeals for the Fifth Circuit, and, in support of its petition, shows:

OPINIONS BELOW and JURISDICTION

The opinion of the Court of Appeals is reported at 270 F2d 666. That of the District Court is reported at 170 FS 933. Both opinions are printed in the Appendix hereto.

The Court of Appeals rendered its judgment on September 30, 1959, and denied a rehearing on December 17, 1959. Jurisdiction of this court lies under 28 USC 1254.

QUESTIONS PRESENTED

1—Does extension, by an ocean carrier, of the time limited for filing of suit under the Carriage-of-Goods-By-Sea-Act, with waiver of that statutory bar, render the defense of limitation unavailable to the carrier?

2—Is it proper for a Court of Appeals to reverse a District Court's judgment, on a concededly factual issue of estoppel of an ocean carrier to plead limitation under the Carriage-of-Goods-By-Sea-Act, even though the Court of Appeals does not hold that the District Court's fact-finding of estoppel was clearly erroneous?

The District Court held that, on the facts, the carrier was estopped, by its inequitable conduct, from pleading limitation against the cargo's claim.

The Court of Appeals, while conceding the issue to be one of fact, and without quarreling with the District Court's findings of fact, reversed that Court's holding of estoppel; but the Court of Appeals recognized that "the question for decision, although narrow, is of considerable importance to the shipping industry".

Chief Judge Hutcheson, dissenting, would have held that "whether or not", as the district court held, "the stipulated facts estopped the defendant from pleading the

bar is immaterial, for the agreement to waive the statute had made the defense of limitation completely unavailable to respondent".

STATUTORY PROVISION INVOLVED

"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered . . .", Carriage-of-Goods-by-Sea-Act, Act of April 16, 1936, c. 229, Title I, §3(6), 49 Stat. 1208, 46 USC 1303(6).

STATEMENT OF THE CASE

This action was brought in admiralty to recover for shortage of, and damage to, a shipment of coffee while in the respondent ocean carrier's custody. 28 USC 1333. The carrier's sole defense was that the action was time-barred.

Claim for the loss was presented to the carrier, by proctors for petitioner, on September 30, 1949; and the carrier began its investigation. It became apparent, however, that the carrier's investigation would not be completed by the anniversary date of the claim. R 19.

Because of the one-year limitation period under the Carriage-of-Goods-by-Sea-Act,[1] proctors for petitioner, on January 30, 1950, suggested "an extension of time within which to bring suit, up to and including April 4, 1950", to give the carrier time to complete its investigation.

[1] 46 USC 1303 (6).

The carrier agreed to the extension, by letter dated February 1, 1950, stating that it would "be glad to discuss adjustment" of the claim. R 19-20.

A conference between the carrier's assistant freight claim agent, and proctors for petitioner, was held on February 17, 1950. At that conference, the claim agent agreed to recommend payment in settlement of the shortage and slackage portions of the claim.

However, it was understood that settlement of these portions of the claim was contingent upon settlement of the damage portion; and proctors for petitioner were requested to furnish additional information for clarification of the damage claim. R 20-22.[2]

On March 2, 1950, proctors for petitioner wrote the carrier that the discrepancies had been resolved. On March 7, 1950, the parties resumed discussions, but agreement was not reached, and the carrier once more asked for additional information. R 22.

Petitioner began at once to secure the requested information; and on the afternoon of the last day of the extended period for suit, proctors for petitioner telephoned the carrier's office to arrange another conference. They were informed that the carrier's office had closed at 4:30 PM on that day. R 22.

[2] These critical facts, "manifesting an intent to dispose of the matter without litigation if at all possible" (District Court's Conclusions of Law—R 37), are omitted from the recital of the facts in the opinion of the Court of Appeals.

The next morning, proctors for petitioner telephoned the carrier's freight claim agent again, to arrange the contemplated conference. The claim agent then, however, declined to discuss the matter at all, on the ground that it had become time-barred on the preceding day. On the same day, proctors for petitioner filed the libel commencing this action. R 23.

The District Court held that the carrier, by its letter of February 1, 1950, waived the statutory one-year limitation period, and created a new contractual limitation period in order that amicable settlement negotiations might continue; and that on the facts and the equities, the carrier was estopped to plead limitation. R 37.

On the carrier's appeal, the Court of Appeals recognized that "it is a question of fact as to whether the conduct of the carrier during the course of the negotiations misled the shipper into a detrimental reliance on the carrier's agreement to extend the time-for-suit period"; but reversed the District Court's judgment, without even discussing its fact-finding on this issue.

Chief Judge Hutcheson dissented, on the ground that when "the parties waived the statute so that it was no longer operative as a bar, and attempted to substitute therefor an ineffective contract period . . . the waiver of the statute is valid and effective (but) the attempt to impose a two month limitation on libelant's right to bring the suit was invalid and ineffective . . . for the agreement to waive the statute had made the defense of limitation completely unavailable to respondent".

ARGUMENT

First Question

So far as can be determined, the proposition on which Judge Hutcheson's dissent is based—that extension by an ocean carrier, of the statutory period of limitation in the Carriage-of-Goods-by-Sea-Act, constitutes a waiver thereof—has never before been advanced.[3]

The novelty and importance of this question alone, warrant review of the case by this court.

Second Question

Thompson vs Phenix Insurance Company, 136 US 287 (1890), involved an action on a fire insurance policy, instituted after the expiration of the contractual limitation period provided in the policy.

Settlement negotiations had been in progress over an extended period, during which the company's agent repeatedly represented to the assured that the claim would undoubtedly be paid.

In these circumstances, this court held that "it would be contrary to justice for the insurance company to hold out the hope of an amicable adjustment of the loss, and thus delay the action of the insured, and then be permitted to plead this very delay, caused by its course of conduct, as a defense to the action when brought".[4]

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[3] The cases on waiver of statutes of limitation are collected in Anno., 1 ALR2d 1445.

[4] 136 US at 299. See also Dawson, *Estoppel and Statutes of Limitation*, 34 Michigan Law Review 1, 15-19 (1935).

In the case at bar, the carrier similarly indicated to petitioner by its negotiations, that the claim would be adjusted amicably without suit.

A short time before the contractual limitation period was due to expire—at which time agreement had been reached as to all but one of the elements of the claim—the carrier asked for additional evidence on this element.

Petitioner set about at once securing the additional information requested by the carrier, and, on the afternoon of April 4, 1950, tried unsuccessfully to reach the carrier's claim agent to arrange another conference regarding the damage portion of the claim. R 9.

When petitioner contacted the carrier's claim agent the next morning, the carrier simply refused to consider the claim at all, on the ground that it had become time-barred on the preceding day.

Petitioner immediately filed suit. Had petitioner had any reason to doubt the carrier's good faith, this suit could easily have been filed the previous evening, thereby precluding any question of limitation.[5]

Only a few months ago, this court held that the principle "that no man may take advantage of his own wrong" is "deeply rooted in our jurisprudence . . . and has frequently been employed to bar inequitable reliance on statutes of limitations".[6]

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[5] "All courts of the United States shall be deemed always open for the purpose of filing proper papers." 28 USC 452.

[6] *Glus vs Brooklyn Eastern District Terminal*, 359 US 231 (1959).

The District Court held, on its findings of fact, that the carrier's inequitable conduct had estopped it to urge the plea of limitation.

Conceding the factual nature of the issue, but without even discussing this fact-finding of the District Court, the majority of the Court of Appeals reversed the judgment.

The action of the Court of Appeals is inconsistent with this court's holdings in *Glus vs Brooklyn Eastern District Terminal* and *Thompson vs Phenix Insurance Company*, discussed above, and in *McAllister vs United States*, 348 US 19 (1954), that findings of fact in admiralty cases may not be set aside on appeal unless clearly erroneous.

CONCLUSION

The Court of Appeals recognized, at the outset of its opinion, the "considerable importance of the shipping industry" of the question for decision.

It is respectfully submitted that the case is appropriate for consideration on certiorari by this court.

Eberhard P. Deutsch,
Proctor for Petitioner

Deutsch, Kerrigan & Stiles,
René H. Himel, Jr.,
Of Counsel

January, 1960

OPINION OF THE COURT OF APPEALS and DISSENTING OPINION

WISDOM, Circuit Judge: The question for decision, although narrow, is of considerable importance to the shipping industry. We are asked to decide the effect of a carrier granting a shipper an extension of sixty days, within which to sue on a cargo claim, beyond the one-year limitation period provided in the Carriage of Goods By Sea Act.

The case was tried on a stipulation of facts. The district court held that the carrier had waived the statutory one-year limitation for suit, although the libel was filed after expiration of the extension period. A majority of the Court holds that the judgment must be reversed.

The Carriage of Goods By Sea Act, 46 USCA 1303(6), provides:

> ". . . In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered . . ."

J. A. Folger Company, libellant, sued in admiralty to recover for shortage and slackage of, and damage to, a certain cargo of coffee shipped aboard one of the vessels belonging to the United Fruit Company, respondent. The vessel arrived in New Orleans February 14, 1949. Several weeks later, proctors for Folger conferred with United Fruit's claim agent. The claim agent agreed to recommend payment in settlement of the claim for

shortage and slackage, contingent upon settlement of the claim for damages. No agreement could be reached with respect to damages. Folger agreed to furnish additional information on this aspect of the case.

January 30, 1950 proctors for Folger wrote the United Fruit, stating:

> ". . . we shall appreciate your granting us an extension of time within which to bring suit, *up to and including April 4, 1950.* We trust that we may be able to dispose of this matter within that time. ¶ We shall also appreciate your confirming the above extension by letter, at your earliest convenience."

The United Fruit Company replied February 1, 1950 granting Folger's request for an extension:

> "In accordance with request in your letter of January 30th, 1950, we take pleasure in granting you extension of time in which to sue through April 4th, 1950 for account of the SS MAYARI.
>
> "We also take pleasure in advising we have now received the file from our principals and we shall be glad to discuss adjustment with you some time next week, if you will contact us by telephone for an appointment.
>
> "The above is given you with full reservation of all other rights accruing through the bill of lading contract and/or otherwise."

After this exchange of letters, the parties engaged in further negotiations: there was a conference on Febru-

ary 17, 1950; Folger wrote March 2, 1950, stating that "discrepancies had been resolved" and Folger desired "again to resume negotiations looking toward settlement"; there were discussions on March 7, 1950, in which United Fruit Company's claim agent stated that he would require additional proof of the alleged damage. Thereafter proctors for Folger did not attempt to reach United Fruit until the last day of the extension period, April 4, 1950. On that day, at 4:45 P.M., one of the proctors for Folger telephoned the United Fruit Company to arrange for an appointment to discuss damages and also to obtain an additional extension. The freight claim office of the United Fruit Company had closed at 4:30 P.M. as it has for many years in New Orleans.

On the morning of April 5, 1950, Folger's proctors telephoned respondent's claim agents and asked for an additional extension. With respect to this conversation, the stipulation states:

> "The respondent, through its assistant freight claim agent, declined to grant an additional extension of time and declined to discuss settlement of the claim further. The assistant claim agent explained that no additional extension had been discussed prior to the expiration of the original extension; that it was not the company's policy to grant extensions of time to file suit after any preceding extension had expired; and that he was not authorized to grant any such extension."

Folger then filed a libel the afternoon of April 5, 1950.

We do not question the principle that the statutory period for bringing suit may be waived.[1] *Noel v. Baskin*, D.C. Cir., 1942, 131 F.2d 231. Nor do we question the principle that, in a proper case, a respondent may, by his representations, promises, or conduct, be estopped to assert the statute. *Glus v. Brooklyn Eastern District Terminal*, 1959, 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed. 771.

In this case, however, the waiver was for a definite period only. There was no waiver as to suit filed after the sixty-day extension period.

Folger's letter requesting an extension is itself an acknowledgment of the carrier's right to plead the statute after expiration of the extension. In answering Folger, United Fruit Company gave notice that the carrier intended not to waive the statutory period as to any suit

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[1] "The effect of a 'waiver' will depend largely on the time when it was made. A waiver in the original contract out of which the liability arises may be held invalid, for it is generally the result of an undesirable exertion of superior bargaining power. But a subsequent waiver will ordinarily be freely given by the defendant, and therefore should be upheld, since it may often be in the interests of both parties to postpone suit. The view that the statute of limitations is a personal defense pervades much of the law—for example, the defendant is permitted to remove the bar by acknowledging the debt; a voluntary relinquishment of the statutory benefit by an express promise not to plead the statute seems to warrant similar treatment. Nevertheless, there is a problem not present in estoppel cases—as to the precise duration of the waiver period. Thus, although an indefinite waiver may be held void as against public policy, a waiver for a definite time will generally be enforced on its terms. And even an indefinite waiver will often be upheld as to the time already expired when the waiver is made, so that the period starts to run anew at that time." Comment, Developments—Statutes of Limitations, 63 Harv. L. Rev. 1177, 1233 (1950). See also Dawson, Estoppel and Statutes of Limitation, 34 Mich. L. Rev. 1 (1935). The cases are collected in 24 A.L.R. 1413 supplementing 130 A.L.R. 8.

brought after April 4, 1950. We read both letters together as constituting a contract between the parties, in which time is of the essence. The consideration is the benefit to each party of extending the period in order to reach a satisfactory settlement.

We see no reason why the agreement should not be enforced according to its terms. A waiver of the statutory limitation is enforced against a defendant when the defendant attempts to plead the statute contrary to the terms of the waiver. *J. A. Campbell Co. v. Holsum Baking Co.*, Wash.S.Ct., 1942, 130 P.2d 333; *United States v. Curtiss Aeroplane Co.*, 2 Cir., 1945, 147 F.2d 639. Correspondingly, the end-date of a waiver for a fixed time should be recognized against a plaintiff attempting to escape the terms of his agreement.

In the Argentino, S.D.N.Y., 1939, 28 F.Supp. 440, 1939 AMC 815, the claimant made a written request for an extension "up to and including April 24, 1938", and a similar verbal request March 23, 1938. The carrier made no written reply agreeing to a specific end-date. Instead, March 23, an adjuster for the steamship company stated verbally that "the time to sue would be extended during the investigation of the claim and negotiations for its settlement". Negotiations between the parties continued and it was not until July 27, 1938 that the claim was finally rejected. In the meantime, as the court pointed out:

> "Both parties by their conduct during the next few months [after March 23, 1938] recognized the existence of such extension. Respondent

> through its agents was still investigating and considering the claim. Offers of settlement were thereafter made and discussed. . . . and it was not until July 27, 1938, that it was finally rejected."

The Court held that there was no public policy against the extension of the one-year limitation clause of 46 USCA 1303(b); and an issue of fact was presented as to whether the carrier was estopped to assert the time limitation. We agree with the Argentino holding. Expressed in terms of waiver, the carrier agreed to extend the limitation period by the time necessary to negotiate a settlement or conclude to reject the claim. Expressed in terms of estoppel, it is a question of fact as to whether the conduct of the carrier during the course of the negotiations misled the shipper into a detrimental reliance on the carrier's agreement to extend the time-for-suit period.

Unlike the agreement in the Argentino, *the agreement* here was for a fixed period. Unlike the facts in the Argentino, the stipulation in the instant case shows that there is no basis for the shipper to argue estoppel against the carrier.

Here, it is the shipper who is acting unconscionably. By inducing the carrier, just four days before the running of the statute, to grant the extension, the shipper put the carrier in the posture of not being able to plead the original statutory period. Now the shippers seek to destroy the effect of the very thing he brought about, after the carrier has changed his position in det-

rimental reliance on the shipper's request. "No man may take advantage of his own wrong." *Glus v. Brooklyn Eastern District Terminal*, 1959, 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed. 770, 773.

It is in the interests of all shippers and all carriers that when a steamship company grants an extension of the time for suit, in writing, before the running of the statute, specifically limited to a fixed and reasonable time, that the parties be able to rely on the terms of their agreement. If a shipper may dishonor an unambiguous extension agreement, and if a carrier is to be penalized for being liberal toward a shipper in not requiring rigid adherence to the statute—there will be no more extensions. And there is not much doubt that extensions of a statute of limitations are usually in the interest of claimants.

Judgment is REVERSED.

HUTCHESON, Circuit Judge, Dissenting:

As appears from the opinion of the majority and that of the district judge,[1] this case is in the briefest compass. Submitted on a stipulation which the judge made his findings of fact, it presents the single issue of law, whether under the undisputed facts the suit was time-barred by the one year limitation period contained in the Carriage of Goods By Sea Act, 46 U.S.C.A.,

[1] J. A. Folger & Co. v. United Fruit Co., 170 Fed. Supp. 933.

Sec. 1303(6). The district judge, holding that, under settled law, the statutory one year period for bringing suit may be waived and that it was waived, concluded that, on the stipulated facts, the libel was timely filed.

I agree with the district judge, and, therefore dissent from the opinion of the majority reversing his judgment.

It seems clear to me that the law on which the district judge acted is settled in favor of his action by the authorities he cited, to which may be added a reference to 34 Am. Jur., "Limitation of Actions", Subdiv. 15, "Waiver and Estoppel", Secs. 405 to 413, pp. 318-325. 46 USCA Sec. 1303(6) "Carriage of Goods By Sea Act" fixes one year as the time limitations for suit and under settled law no shorter period can be contracted for. The Argentino. 28 F. Supp. 440.

Here the parties waived the statute so that it was no longer operative as a bar and attempted to substitute therefor an ineffective contract period of two months, with the result that, while the waiver of the statute is valid and effective, the attempt to impose a two month limitation on libellant's right to bring the suit was invalid and ineffective. In short, when the respondent stipulated that it had waived the statutory bar of limitation, it stipulated its limitation defense completely out of court and whether or not, as appellee seems to think the court held, the stipulated facts estopped the defendant from pleading the bar is immaterial for the agreement to waive the statute had made the defense of limitation completely unavailable to respondent.

I think the judgment was right and should be affirmed.

JUDGMENT OF THE COURT OF APPEALS

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the judgment of the District Court in this cause be, and the same is hereby, reversed;

It is further ordered, adjudged and decreed that the appellee, J. A. Folger & Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Hutcheson, Circuit Judge, dissenting."

FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT

CHRISTENBERRY, J.:

This is a libel by J. A. Folger & Company against the United Fruit Company for alleged cargo shortage, slackage and damage. The cargo in question consisted of 28,918 bags of coffee shipped from various ports in El Salvador to New Orleans, Louisiana, aboard the Steamship Mayari. Neither party produced any witnesses, the case being submitted to this Court for decision solely on the basis of the pleadings and a stipulation of facts, which the Court adopts as its findings of fact,

FINDINGS OF FACT

I.

At all material times libelant, J. A. Folger & Company, was and is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, and respondent, United Fruit Company, was and is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey.

II.

At all material times libelant was the consignee of the cargo of coffee described in the libel, and is entitled to maintain this action.

III.

On or about January 18, 1949, the 28,918 bags of coffee described in the libel were received by respondent and the Steamship Mayari in apparent good order and condition at various ports in El Salvador for carriage to New Orleans pursuant to bills of lading incorporating the Carriage of Goods by Sea Act.

IV.

On or about February 4, 1949, the Mayari arrived at the port of New Orleans where said consignments of coffee were subsequently discharged and delivered. However, there was a net shortage of 42 bags of coffee from the

consignments in question upon delivery at New Orleans, and an additional 16 bags were delivered at New Orleans in a torn and slack condition with a resulting loss in weight of 462 pounds of coffee, as set forth in the schedules attached to the stipulation and marked "Libelant-23" and "Libelant-24".

V.

In addition to the above shortage and slackage, at least 516, and perhaps as many as 544, bags of coffee from the consignments in question outturned from the vessel damaged to some extent. Some of the bags were wetted and visibly stained.

VI.

On September 30, 1949, proctors for libelant submitted an attorney's claim bill with supporting documents in amount of $5,771.05, representing claim for the shortage, slackage and damage to the coffee in question.

VII.

On October 11, 1949, respondent, through its assistant freight claim agent, now deceased, acknowledged receipt of said claim and supporting documents stating that the claim would be investigated without prejudice.

VIII.

On November 16, 1949, proctors for libelant telephoned and were advised that respondent's investigation of the claim had not yet been completed.

IX.

By letter dated January 30, 1950, a copy of which was attached to the stipulation and marked "Libelant A" proctors for libelant inquired of respondent whether its assistant freight claim agent was in a position to discuss settlement of the claim, and also requested an extension of time up to and including April 4, 1950, within which to bring suit.

X.

By letter dated February 1, 1950, a copy of which was attached to the stipulation and marked "Libelant B", respondent granted an "extension of time in which to sue through April 4th, 1950, for account of the S/S Mayari". Respondent further advised "We take pleasure in advising we have now received the file from our principals and we shall be glad to discuss adjustment with you some time next week, if you will contact us by telephone for an appointment."

XI.

Such an appointment was arranged for February 15, 1950 but was subsequently postponed until February 17, 1950. On that date, proctors for libelant met with respondent's assistant freight claim agent in the latter's office and discussed the claim.

XII.

The first item in libelant's claim bill covering the short delivery of 42 bags of coffee was first reviewed, and after a correction of one minor arithmetical error amounting

to $3.02, said assistant freight claim agent agreed to recommend to his superiors in New York that respondent pay $1,958.25 in compromise of that portion of the claim, but it was understood that settlement of the shortage and slackage portions of the claim was contingent upon settlement of the damage portion of the claim. Proctors for libelant agreed to accept said amount.

XIII.

The second item in libelant's claim bill covering the slack delivery of 362 pounds of coffee was next reviewed, and respondent's freight claim agent agreed to recommend to his superiors in New York that respondent pay $66.21 in compromise of that portion of the claim, but it was understood that settlement of the shortage and slackage portions of the claim was contingent upon settlement of the damage portion of the claim. Proctors for libelant agreed to accept the said amount.

XIV.

There was then discussed that portion of the claim bill involving the allegedly water damaged coffee. Libelant claimed that 22,377 pounds of coffee had outturned damaged, with the resulting loss to libelant of $2,992.66 after deducting amounts received from salvage. However, no tentative agreement or figure was reached in regard to the damage portion of the claim, and respondent's freight claim agent requested additional information.

XV.

Following this, proctors for libelant discussed the damage portion of the claim with a representative of S. Jackson & Sons, Inc., weighers and forwarding agents, who acted for libelant herein. A representative of that company thereafter checked its own records and those of respondent, and reported to proctors for libelant that 22,377 pounds of damaged coffee was the correct figure.

XVI.

By letter dated March 2, 1950, a copy of which was attached to the stipulation and marked "Libelant C" proctors for libelant notified respondent that the aforesaid discrepancies had been resolved, and, accordingly, they desired "again to resume negotiations looking toward settlement."

XVII.

On March 7, 1950, discussions concerning the damage portion of the claim were resumed. At that time respondent's assistant freight claim agent again stated he would require additional proof of the alleged damage. It was therefore necessary to adjourn that meeting, and proctors for libelant again contacted S. Jackson & Son, Inc., for further information. On March 14, 1950, S. Jackson & Son, Inc. forwarded to proctors for libelant additional information.

XVIII.

Thereafter, proctors for libelant did not attempt to contact respondent until April 4. At 4:45 P.M. on that date, proctors for libelant called respondent's office and were informed that respondent's assistant freight claim agent had gone for the day. The freight claim office of the United Fruit Company in New Orleans has for many years prior and subsequent to April 4, 1950, closed at 4:30 P.M. The purpose of proctor's telephone call was to arrange for an appointment to discuss the damage portion of the claim and also to obtain an additional extension of time within which to bring suit.

XIX.

On the morning of April 5, 1950, proctors for libelant telephoned respondent's assistant freight claim agent at his office and requested an appointment to discuss the damage portion of the claim and also requested that an additional extension of suit time be granted, pointing out that the previous extension of time which had been granted expired the day before, and further outlining the attempt which was made to contact respondent's freight claim agent on April 4. It was assumed by proctors for libelant that the desired extension of time would be granted because of the negotiations which had been previously had looking toward an amicable disposition of the matter, although they had never previously in other similar cases in dealing with the respondent obtained an extension of time to file suit after any such existing extension had expired. The respondent, through its as-

sistant freight claim agent, declined to grant an additional extension of time and declined to discuss settlement of the claim further. The assistant claim agent explained that no additional extension had been discussed prior to the expiration of the original extension; that it was not the company's policy to grant extensions of time to file suit after any preceding extension had expired and that he was not authorized to grant such an extension.

XX.

Proctors for libelant immediately drafted and filed a libel commencing this action the afternoon of April 5, 1950.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction over the subject matter of this suit and the parties herein.

II.

The merchandise in question having been received by respondent in apparent good order and condition, and having been delivered short in quantity and damaged, the burden is on respondent to show that the loss and damage were occasioned by a cause for which it has no responsibility under its bill of lading or under the Carriage of Goods by Sea Act. 46 U.S.C.A. 1301 et seq.; *Clark v. Barnwell*, 53 U.S. 272 (1851); *The Vallescura*, 293 U.S. 296 (1934); *Orient Insurance Company v. Flota Mercante Del*

Estado, 102 F.S. 729 (ED La., 1951), aff'd 198 F. 2d 740 (CA 5; 1952).

III.

Respondent has failed to establish that the loss and damage were occasioned by any of the perils for which it has no responsibility under its bill of lading or the Carriage of Goods by Sea Act.

IV.

Respondent argues that libelant's cause of action was time-barred before suit was instituted and it cites a series of cases in which the one-year limitation period contained in the Carriage of Goods By Sea Act, 46 U.S.C.A., Section 1303 (6), was applied. None of these decisions, however, holds that after timely presentation of claim the statutory one-year period for bringing suit may not be waived by the carrier.

Here it appears that active settlement negotiations were in progress from the time the claim was first presented, with both parties at all times manifesting an intent to dispose of the matter without litigation if at all possible. Apparently with this end in view, respondent by its letter of February 1, 1950, waived the statutory one-year limitation and created an entirely separate and private one in order that amicable negotiations might continue. When respondent indicated for the first time on April 5, 1950, that it would no longer discuss amicable adjustment, suit was instituted the very same day. Based

on these facts this Court holds that the libel was timely filed. *Thompson v. Phenix Ins. Co.* 136 U.S. 287 (1890); *The Cali*, 1950 A.M.C. 1089, 339 U.S. 684; *Green Star S.S. Co. v. Nanyang Bros. Tobacco Co.*, 1925 A.M.C. 221, 3 F. 2d 369 (CA 9); *Pacific Coast Co. v. Yukon Independent Transp. Co.*, 155 Fed. 29 (CA 9, 1907); *The Argentino*, 1939 A.M.C. 815, 28 F.S.440 (SD NY); *Alten v. McFall*, 89 Fed. 463 (ND NY, 1898); *Austin v. Wacks*, 15 NW 409 (Minn, 1883.)

V.

Libelant's damages will be determined on the basis of market value of the coffee at New Orleans in like condition as when shipped, on February 4, 1949, the arrival date of the vessel. *The Ansaldo San Georgio I v. Rheinstrom Bros. Co.*, 294 U.S. 494 (1935); *St. John's N.F. Shipping Corp. v. S.A. Companhia Geral Commercial de Rio de Janiero*, 263 U.S. 119 (1923); *Reider v. Thompson*, 197 F.2d 158 (CA 5, 1952); *Sanib Corporation v. United Fruit Co.*, 74 F.S. 64 (SD NY 1947.)

Let a decree be entered in favor of libelant in accordance with these findings.

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FILED
FEB 19 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1959.

No. 657

J. A. FOLGER & COMPANY,
Petitioner,

versus

UNITED FRUIT COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

JOHN W. SIMS,
420 Hibernia Bank Building,
New Orleans 12, Louisiana,
Attorney for Respondent.

JAS. HY. BRUNS,
CHARLES E. DUNBAR III,
PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS,
Of Counsel.

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BRIEF FOR RESPONDENT IN OPPOSITION.

MAY IT PLEASE THE COURT:

I. OPINIONS BELOW.

The opinions below are reported as set forth on Page 1 of the Petition.

II. JURISDICTION.

Jurisdictional requisites are correctly set forth in the Petition, but Respondent submits there is no basis for granting a Writ of Certiorari herein.

III. STATUTES INVOLVED.

The only statute involved is the Carriage of Goods by Sea Act, 46 U.S.C. 1303(6), set forth on page 3 of the Petition.

IV. ARGUMENT.

Petitioner's "First Question".

Respondent submits this is not a proper case for the granting of a Writ of Certiorari simply because one Judge of a Court of Appeals renders a dissenting opinion which is novel and which is not supported by any decision of any Federal Court involving the pertinent question at issue. Petitioner itself admits that the proposition on which this dissent is based "has never before been advanced." The only cases cited by Judge Hutcheson in his dissent are those cited by the District Judge in Article IV of his Conclusions of Law (R. 37, Appendix to Petition, p. 26, 170 F. Supp. 933, 936-937).

None of those authorities is in point here. They involved and discussed situations where indefinite waivers of statutes of limitations were granted or where negotiations were continued without reservations after the limitation time had run. Here, as the Court of Appeals carefully pointed out three separate times in its opinion, the extension of the one year limitation within which to bring suit was for a definite and fixed period of time.

A limited and fixed extension of the time for filing suit "up to and including April 4, 1950" was requested in the

letter of January 30, 1950, written by the Proctors of Petitioner to Respondent (Libellant Exhibit "A", R. 26), and in accordance with such request an "extension in time in which to sue through April 4th, 1950" was granted by Respondent in its reply letter of February 1, 1950 (Libellant Exhibit "B", R. 27).

Petitioner makes no contention that the decision herein is in conflict with any decision of another Court of Appeals on the same matter or that the decision is in conflict with any applicable decision of this Court. Respondent is of the opinion that no such contention can be made.

The United States Courts of Appeals and District Courts have strictly construed and applied the one year limitation for suit in the Carriage of Goods by Sea Act U.S.C. 1303(6).[1] The Court of Appeals for the Fifth Circuit in its opinion herein simply and correctly construed and applied a fixed extension of that limitation in the same way that the Courts have construed and applied the original one year limitation in the Act. There is, therefore, no important question of Federal Law which has not been, but should be, settled by this Court

Needless to say, if Judge Hutcheson's view became the law, a multiplicity of litigation would result as carriers

[1] See, among others *Bethgar v. Colorado Fuel & Iron Corp.*, 138 F. Supp. 595 (S.D.N.Y. 1955), aff'd. 245 F. 2d. 903 (2 Cir. 1957), cert. denied 355 U.S. 862 (1957); *Compagnie Tunisienne v. Lykes Bros. Steamship Co.*, 243 F.2d 683 (2 Cir. 1957); *Potter v. North German Lloyd*, 50 F. Supp. 173 (N.D. Calif. 1943); *Aluminum Supply Co., Inc. v. Lykes Bros. Steamship Co., et al.*, 1957 A.M.C. 1718 (S.D. Texas 1958 not otherwise reported).

could not grant shippers extensions of time within which to sue for fixed periods of time without subjecting themselves to suit for indefinite periods of time.

Petitioner's "Second Question".

The fallacy of Petitioner's argument on this point is readily apparent. The District Judge found no facts whatever on the trial before him. He had no need to make any Findings of Fact. The case was submitted and decided upon a stipulation of all of the facts as agreed upon by the two parties to the suit (R. pp. 17-24 incl.). The District Judge simply adopted the Stipulation of Facts as his Findings of Fact (R. 29, Appendix to Petition, p. 17, 170 F. Supp. 934). No witnesses were produced and no testimony was taken. Obviously, therefore, the McAllister[2] doctrine has no application for the Court of Appeals did not set aside any findings of fact of the District Court for there were none to set aside, whether "clearly erroneous" or not. For the same reasons Rule 52 of the Federal Rules of Civil Procedure would not be applicable.

We are supported in these conclusions by the following authorities.

In *Supervisors of Wayne Co. v. Kennicott*, 103 U.S. 554, 556-557 (1881), this Court held:

> "As to the finding. Even before the Act of 1865, * * * * * it was always held that a judgment on agreed facts spread at large on the record could be

[2] *McAllister v. United States*, 348 U.S. 19 (1954).

reviewed here on a writ of error. * * * * * Such a statement was considered to be equivalent to a special verdict and to present questions of law alone for the consideration of the court. * * * * * *

"This record shows distinctly that the court was only required to determine whether in law, on the agreed facts, the defendants were liable on their bond. * * * *

"* * * There was no issue but of law, and that the court found for the plaintiffs. The same case is brought here by the record and we are entirely satisfied it is one we have the power to review."

Again in *Saltonstall v. Russell*, 152 U.S. 628, 630 (1894), this Court said:

"The case having been submitted to the circuit court upon a statement of facts agreed by the parties, or case stated, upon which the court was to render such judgment as the law required, all questions of the sufficiency of the pleadings were waived, and the want of an answer was immaterial; and no finding of fact by the court was necessary * * * * * *."

In *Wiggenton v. Order of United Commercial Travelers of America*, 126 F. 2d 659, 661 (7 Cir. 1942), the Court of Appeals had no doubt on this point when it said:

"Since the facts are not in dispute, we are free to consider them and to reach our own conclusion, untrammeled by the District Court's findings and conclusions of law. Especially is this rule applicable in the case at bar, where all the facts are stipulated. * * * * * *."

Tipton, et al. v. Bearl Sprott Co., Inc., 93 F. Supp. 496, 498 (S.D. Calif. 1950), was decided by Judge Yankwich, who wrote the Address "*Findings in the Light of the Recent Amendments to the Federal Rules of Civil Procedure*", 8 F.R.D. 271. In the *Tipton* case he discussed this question fully and held:

> "As the case stands now, the facts are not in dispute, and it wholly remains for the Court to draw conclusions from the admitted facts. I have not had the benefit of any oral testimony. The advantage of the situation is that, if the Court of Appeals is not satisfied with the conclusions I have drawn, they may draw their own.
>
> "It is the accepted rule that where a case is presented on stipulated facts, the mandate of the Fed. Rules Civ. Proc. Rule 52, 28 U.S.C.A., that 'findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses' does not come into play. In short, when there are no witnesses, and the Court draws inferences from agreed facts, then the presumption of the correctness of the trial court's findings does not apply. The courts have so held repeatedly, and have not hesitated to draw different legal conclusions from admitted facts. * * * * * *"

Under this heading Petitioner cites but two cases, both of which are easily distinguishable from the case at bar. They are not apposite to the second question presented by Petitioner and really involve the question of estoppel. In *Thompson v. Phenix Insurance Company*, 136 U.S. 287 (1890), negotiations and assur-

ances of settlement were continued after the limitation time for suit had run. Here the Respondent refused to discuss the claim after such time had run. In *Thompson* no written agreement extending such time was made; here a definite extension with an end period was granted to Petitioner exactly in accordance with its specific request.

The same is likewise true of the other case cited, *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959). None of the controlling factors present in this case was involved there. This Court decided the *Glus* case solely on the point that the time limit to sue in the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, could be waived by the employer if it misled the employee by its statements and actions that he had seven years within which to sue. Here the Petitioner's attorneys knew well the one year provision for suit in the controlling statute and, having asked for a fixed extension of time, received a written agreement granting the favor asked. In fact, the Court of Appeals cites the *Glus* case against Petitioner's contentions. At page 669 of its opinion in 270 F. 2d. (Appendix to Petition, pp. 14, 15) that Court said:

> "Here, it is the shipper who is acting unconscionably. By inducing the carrier, just four days before the running of the statute, to grant the extension, the shipper put the carrier in the posture of not being able to plead the original statutory period. Now the shippers seek to destroy the effect of the very thing he *(sic)* brought about, after the carrier has changed his position in detrimental

reliance on the shipper's request. 'No man may take advantage of his own wrong'. *Glus v. Brooklyn Eastern District Terminal*, * * * * * *"

V. CONCLUSION.

Accordingly, we submit there is no basis for granting a Writ of Certiorari herein.

Respectfully submitted,

JOHN W. SIMS,
420 Hibernia Bank Building,
New Orleans 12, Louisiana,
Attorney for Respondent.

JAS. HY. BRUNS,
CHARLES E. DUNBAR III,
PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS.
Of Counsel.